## ELITE DATA SDN BHD v. JOHN GILCHRIST MCBAIN & ANOR

HIGH COURT MALAYA, GEORGETOWN
NORDIN HASSAN JC
[CIVIL SUIT NO: 22-791-2009]
19 MARCH 2015

***CONTRACT:*** *Illegality – Agreement – Agreement in contravention of s. 105 of Banking and Financial Institutions Act 1989 – Whether agreement forbidden by law – Whether agreement enforceable – Contracts Act 1950, s. 24*

***CONTRACT:*** *Illegality – Knowledge – Whether knowledge of illegality negated entitlement for relief under s. 66 of Contracts Act 1950 – Whether plaintiff had knowledge of illegality when entering into contract – Whether illegality discovered subsequently – Whether plaintiff entitled to relief sought*

***CONTRACT:*** *Formation – No written contract signed between parties – Whether contract existed based on facts and conduct of parties – Expiry of tenancy agreement – Tenants continued to occupy property – Whether agreement by parties to continue with tenancy agreement existed – Whether tenants liable for rentals*

The plaintiff and defendants had entered into a tenancy agreement of a piece of property ('the property') for the period of 1 September 2005 to 31 August 2006 with an option to purchase of the property, to be exercised before the expiry of the tenancy. Subsequently, the plaintiff and defendants had entered into a sale and purchase agreement ('SPA') dated 19 March 2007 for the purchase of the property at the purchase price of RM2,450,000. Pursuant to the SPA, the defendants had paid RM1,960,000 to the plaintiff on 21 August 2007 by obtaining a loan from the HSBC Bank Malaysia Bhd ('HSBC'), leaving a differential balance of RM490,000. The plaintiff contended that, in order to settle the differential sum, the plaintiff had entered into a supplemental agreement dated 1 August 2007 which, *inter alia*, provided that a total sum of RM223,000 to be deducted from the differential sum and that the balance after deduction amounting to RM267,000 to be paid in three instalments to the plaintiff. By cls. 2 and 4 of the supplemental agreement, the plaintiff agreed to issue a letter to the defendant's financier, confirming that the differential sum of RM490,000 had been received by the plaintiff, when in fact it had not been paid. The purpose of the letter was to ensure that the defendant' loan was released to the plaintiff. It was the plaintiff's case that the defendants had not paid the amount of RM267,000 to the plaintiff. The plaintiff further claimed for the rentals for the period between December 2006 and August 2007 as the defendants had continued to occupy the property after the expiry of the tenancy period and the costs for renovation works and for cabinet and racks which were carried out upon the defendants' requests. The defendants, on the other hand, contended that they had paid in full the purchase price of the property and denied signing or entering into the supplemental agreement dated 1 August 2007. The issues for the court's determination were: (i) whether the supplemental agreement was valid and

A enforceable contract; (ii) whether the plaintiff could seek statutory relief provided in s. 66 of the Contracts Act 1950 ('the Act'); (iii) whether the plaintiff had proven its claims for monthly rentals from December 2006 to August 2007 and its claim for renovation works and costs of cabinet and racks.

B **Held (allowing plaintiff's claim in part):**

**(1)** The object of cls. 2 and 4 of the supplemental agreement clearly contravened provisions of s. 105 of the Banking and Financial Institutions Act 1989 for providing false information which caused a false entry in any document relating to the transaction of a licensed institution and in this case, the HSBC. Therefore, cls. 2 and 4 were forbidden by law and contrary to public policy and if permitted, would defeat the law and as such contravened s. 24 of the Act. The supplemental agreement dated 1 August 2007 was therefore void and unenforceable. (paras 49-51)

**(2)** The party seeking relief must not be a party to the illegality and the court will not assist a party that involves in any illegal act. The party seeking relief under s. 66 of the Act must show that he has no knowledge of the illegality at the time the contract was entered and the illegality was only discovered subsequently. The plaintiff in the present case had the knowledge of his illegal act and the purpose of doing it was to ensure that HSBC would release the loan to the plaintiff. Therefore, the plaintiff was unable to obtain the relief under s. 66 of the Act. (paras 54, 56 & 57)

**(3)** As the supplemental agreement was unenforceable and the plaintiff had failed to seek the relief under s. 66 of the Act, the claim for the amount of RM267,000 was not substantiated. The plaintiff had therefore failed to prove its claim on the balance of probabilities. (paras 58 & 61)

**(4)** In the absence of a formal contract, the court may ascertain whether a contract existed based on the facts and conduct of the parties. On the facts, the tenancy period expired on 31 October 2006 and the vacant possession of the property pursuant to the SPA was only given on 21 August 2007 upon the payment of the purchase price. The defendants had continued to occupy the property upon the expiry of the tenancy period and therefore, there existed an agreement by the parties to continue with the tenancy agreement. As the plaintiff was the owner of the property until 21 August 2007, the defendants were required to pay the rentals from December 2006 to August 2007 amounting to RM135,000. (paras 66, 68-71)

**(5)** The claim for renovation works and costs of cabinet and racks were supported by invoices and therefore, the plaintiff had proven its claim for the renovation works and the costs of cabinet and racks. (paras 72 & 73)

**Case(s) referred to:**

*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC* ***(refd)***

*Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA* ***(refd)***

*Kanuri Sivaramakrishnaiah v. Vemuri Venkata Narahari Rao AIR 1960 Andh Pra 186* ***(refd)***

*Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd (No 1) [1998] 2 CLJ Supp 472 HC* ***(refd)***

*Ng Siew San v. Menaka [1973] 1 LNS 99 FC* ***(refd)***

*Phoenix Insurance v. Adas [1987] 2 All ER 152* ***(refd)***

*Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724* ***(refd)***

**Legislation referred to:**

Banking and Financial Institutions Act 1989, s. 105
Contracts Act 1950, ss. 10, 24, 66
Evidence Act 1950, s. 103

*For the plaintiff - Sharmila Kaur; M/s K Ahmad & Yong*
*For the defendants - Ravin Vello; M/s Vello Kader & Shah*

*Reported by S Barathi*

## JUDGMENT

**Nordin Hassan JC:**

### Introduction

**[1]** The plaintiff in this case instituted a writ action against the defendants claiming among others a sum of RM267,000 arising from a supplemental agreement and costs of renovation works.

**[2]** Plaintiff is a company with its address at 108-19-1, Persiaran Gurney, Penang and also the developer of the development known as Millennium Tower at Gurney Drive, Penang.

**[3]** The first defendant is a citizen of United Kingdom and Northern Ireland whilst the second defendant, the wife of the first defendant is a citizen of New Zealand.

### Background Facts

**[4]** By a tenancy agreement dated 3 August 2005 ('the said tenancy agreement') signed by the first defendant and the plaintiff, the first defendant had rented the property known as No. 108-10-1, Millennium Tower, 108, Persiaran Gurney, 10250 Penang ('the said property') for the period of 1 September 2005 to 31 August 2006 at the rental of RM5,000 per month with an option to renew the tenancy for another year at a rental of RM15,000 per month.

**[5]** Clause 7 of the said tenancy agreement gives an option to the first defendant to purchase the said property at the price of RM2,350,000 within the term of the said tenancy of one year. The first defendant has to exercise this option before the expiry of the said tenancy which is on 31 August 2006.

**[6]** The first defendant, pursuant to cl. 9 of the said tenancy agreement was also given the first right of refusal to purchase the said property at the price of not less than RM2,350,000.

**[7]** At the same time, the plaintiff and the defendants entered into an upgrading/renovation agreement dated 3 August 2005 ('the said upgrading agreement') to carry out the renovation works as requested by the defendants. Pursuant to cl. 1 of this agreement, the costs of the works was to be paid by the defendants by way of 12 monthly instalments of RM10,000 per month. Annexure 1 to the said upgrading agreement is the final list of fixtures and fittings requested by the defendants.

**[8]** Later, the commencement date of the said tenancy agreement was postponed to 1 November 2005 and the keys to the said property were given to the defendants on 31 October 2005. The dates of expiry of the option to purchase, first right of refusal to purchase and the tenancy renewal were also postponed by two months accordingly.

**[9]** The defendants continue to occupy the said property upon the expiry of the said tenancy which was on 31 October 2006.

**[10]** In January 2007, the defendants negotiated with the plaintiff to purchase the said property. In February 2007, the defendants obtained approval for a loan from HSBC Bank Malaysia Bhd ('HSBC') for the amount of RM1,960,000 to purchase the said property.

**[11]** Both parties then entered into a sale and purchase agreement dated 19 March 2007 whereby the plaintiff has agreed to sell and the defendants have agreed to purchase the said property for a purchase price of RM2,450,000 and according to the terms and conditions of the said sale and purchase agreement.

**[12]** The defendants were still occupying the said property when the sale and purchase agreement was entered into by the parties.

**[13]** Section 9.0 of the sale and purchase agreement provides that the vacant possession of the said property is to be delivered to the defendants upon full payment of the purchase price and all other monies due under the said agreement.

**[14]** At the same time, the plaintiff and the defendants entered into an upgrading supplemental agreement dated 19 March 2007 to carry out further upgrading works in the said property as stated in the said agreement. The said works were completed by the plaintiff.

**[15]** Thereafter, on 21 August 2007, the amount of RM1,960,000 was paid by the defendants to the plaintiff. As the purchase price of the said property is RM2,450,000, the balance of the purchase price to be paid by the defendants to the plaintiff is RM490,000.

**[16]** The plaintiff contends that after taking into account a discounts, rebate and refund granted by the plaintiff to the defendants on the said differential sum of RM490,000, the defendants are required to pay the plaintiff the sum of RM267,000.

**[17]** Conversely, the defendants aver that the defendants had settled the full amount of the purchase price of the said property.

**The Plaintiff's Case**

**[18]** The plaintiff's claims against the defendants are as follows:

(i) the sum of RM267,000.

(ii) interest on the sum of RM267,000 at the rate of 8% per annum calculated on a daily basis from 1 September 2007 until full settlement.

(iii) monthly rental from December 2006 to August 2007 in the sum of RM135,000.

(iv) cost of renovation works in the sum of RM31,190.

(v) cost of cabinet and rack in the sum of RM5,100.

(vi) costs.

**[19]** Plaintiff contends that the first defendant had requested plaintiff to provide an arrangement for the defendants to repay the said differential sum of RM490,000 which is the balance of the purchase price of the said property.

**[20]** The plaintiff then agreed to the first defendant's request and both parties had entered into a supplemental agreement dated 1 August 2007.

**[21]** Section 1 of the said supplemental agreement provides that in consideration of the defendants undertaking to continue paying rental promptly to the plaintiff, the plaintiff agrees to grant the defendants a discount, rebate and refund upon full payment of the said purchase price on or before 31 December 2007.

**[22]** The total amount of the discount, rebate and refund is RM223,000 and the details are as follows:

(i) a discount of RM73,000 of the said purchase price.

(ii) a rebate of RM120,000 equivalent to 12 months rent.

(iii) RM30,000 being the refund of the rental deposit under the said tenancy agreement.

**[23]** As the balance of the purchase price of the said property is RM490,000, and after the deduction of the discount, rebate and refund of RM223,000, the defendants are required to pay the plaintiff the sum of RM267,000.

**[24]** With regard to the amount of RM223,000, s. 3 of the said supplemental agreement provides that this amount is to be paid by the defendants to the plaintiff in three instalments or RM89,000 each payable in the following manner:

(i) on or before 31 August 2007.

(ii) on or before 31 October 2007.

(iii) on or before 31 December 2007.

**[25]** The plaintiff described these instalment payments as a friendly loan by the plaintiff to the defendants.

**[26]** Apart from this, cl. 2 of the said supplemental agreement, provides that in consideration of the defendants agreeing to keep indemnified against all loss, claims or liabilities arising from the defendants' request, the plaintiff is agreeable to the request of the defendants to issue a letter to the defendants' financier confirming that the differential sum of RM490,000 has been received by the plaintiff when the same has not been paid to the plaintiff as yet.

**[27]** It is the plaintiff's case that the defendants have not paid the said amount of RM267,000 to the plaintiff until today.

**[28]** The plaintiff also contends that the defendants continue to occupy the said property and had failed to pay the rental for the months of December 2006 to August 2007 at RM15,000 per month as provided under the said tenancy agreement. As provided under s. 9 of the said sale and purchase agreement the vacant possession was to be delivered to the defendants upon payment of the full purchase price and since the loan from HSBC was released on 21 August 2007, the plaintiff is entitled for the rentals as claimed.

**[29]** It is also the plaintiff's case that the defendants had requested the plaintiff to install fixtures and fitting in the said property. This request was made *vide* a handwritten note written by the second defendant to the plaintiff and the defendants agreed to pay for half of the fixtures and fitting marked 'RMV', the initial of the second defendant, and the rest is to be paid by plaintiff. The particulars in the handwritten note was inserted in the list annexed to the upgrading agreement as Annexure 1.

**[30]** The plaintiff then submits that the defendants had failed to pay the cost of renovation works carried out by the plaintiff amounting to RM31,190. The particulars of the renovation works which had been completed by plaintiff are as reflected in invoices marked P4, P7 and P11. They are as follows:

(i) P4 – invoice dated 7 December 2005 – RM19,070.

(ii) P7 – invoice dated 15 September 2006 – RM3,115

(iii) P11 – invoice dated 1 March 2007 – RM9,005.

**[31]** On top of this claims, the plaintiff is also claiming the cost of cabinet and rack in the sum of RM5,100 under invoice dated 21 October 2006 marked P8.

**Defendants' Case**

**[32]** On the other hand, the defendants contend that the defendants had paid in full the purchase price of the said property. This fact has been confirmed by the plaintiff *vide* the plaintiff's letter dated 4 July 2007.

**[33]** The defendants also denied signing or entered into the said supplemental agreement dated 1 August 2007.

**[34]** Mrs. Rhodora A Cenis (DW3), the domestic helper of the defendants also denied having signed the supplemental agreement dated 1 August 2007 and have not seen the said agreement before.

**[35]** The defendants also contend that the said supplemental agreement is highly questionable, void and unlawful on the following reasons:

(i) it is dated 1 August 2007, few months after the sale and purchase agreement dated 19 March 2007.

(ii) the terms of the supplemental agreement appears to be based on past consideration.

(iii) it was stamped on 14 March 2012, a few years later.

(iv) it was not signed by the defendants.

(v) the defendants' domestic helper Rhodora A Cenis denied having signed the supplemental agreement.

(vi) the terms in the supplemental agreement were never recorded as part of the sale and purchase agreement of the said property.

(vii) the supplemental agreement is illegal and against public policy and therefore void under s. 24 of the Contracts Act 1950.

**[36]** As to the claim for the sum of RM135,000 for rentals from period of December 2006 to August 2007, the defendants contend that there is no tenancy agreement during this period. The defendants also argued that as the result of entering into the sale and purchase agreement dated 19 March 2007, the plaintiff had agreed that the six months rental paid in advance for the period from September 2006 until February 2007 to be considered as rental. The defendants also submit that since the sale and purchase agreement has been signed by parties, the defendants need not pay any further rental as there was a sale of the said property to the defendants.

**[37]** As regards the plaintiff's claim for renovation costs of RM31,190, the defendants contend that the said renovations works were not included in the upgrading supplemental agreement dated 19 March 2007 and therefore the defendants are not liable to pay the said amount.

**[38]** Lastly on the plaintiff's claim for the sum of RM5,100 for costs of cabinet and rack, the defendants submit that as the works are listed in the itemised list that form part of the upgrading supplemental agreement dated 19 March 2007 which the plaintiff claims that the amount of RM245,000 has been fully settled by the defendants, the plaintiff cannot again claim the said amount.

**Findings Of The Court**

**[39]** It is trite law that plaintiff in this case has to prove its case on the balance of probabilities. The law is also clear that the party who alleges a fact must produce evidence in proof of it. Section 103 of the Evidence Act 1950 provides:

> The burden of proof as to any particular facts lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In Court of Appeal case of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627, Siti Norma JCA said this:

> He who alleges must prove such allegation and onus is on the appellant to do so. See section 103 of the Act.

**The Plaintiff's Claim For The Sum Of RM267,000**

**[40]** As regard to this claim, firstly, the plaintiff and the defendants had entered into a sale and purchase agreement dated 19 March 2007 for the defendants to buy the said property at the purchase price of RM2,450,000.

**[41]** The validity of the sale and purchase agreement is not disputed by parties. It is a valid, binding and enforceable contract as it fulfilled the requirement of s. 10 of the Contracts Act 1950.

Section 10 provides:

> All agreements are contracts if they are made by the free consent, of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

**[42]** Pursuant to the said sale and purchase agreement, the defendants had paid the sum of RM1,960,000 to the plaintiff by obtaining a loan from HSBC. This amount was paid on 21 August 2007. As the purchase price of the said property is RM2,450,000 and amount paid was RM196,000 the balance or differential sum is RM490,000. This is the amount to be paid by the defendants to the plaintiff.

**[43]** In order to settle this differential sum, the plaintiff contends that the plaintiff and the first defendant had entered into a supplemental agreement dated 1 August 2007. Section 1 of the supplemental agreement provides that the total sum of RM223,000 as discount, rebate and refund which is to be deducted from the differential sum and s. 3, provides the manner in which the balance sum of RM223,000 to be paid to the plaintiff in three instalments of RM89,000 each.

**[44]** However, the issue here is whether the said supplemental agreement (P13) is valid and enforceable contract. Having perused the contents of P13, this court is concerned with the provisions of cls. 2 and 4 of P13. By these clauses, the plaintiff agreed to issue a letter to the defendants' financier, confirming that the differential sum of RM490,000 has been received by the plaintiff when in fact it has not been paid.

**[45]** The purpose of issuing the said letter dated 4 July 2007 to the defendants' financier, HSBC was to ensure that the defendants' loan is released to the plaintiff. The facts shows that after the said letter was issued, the plaintiff received the sum of RM1,960,000 from HSBC on 21 August 2007.

**[46]** On this issue, s. 24 of the Contracts Act 1950 provides that the consideration or object of an agreement is unlawful if it comes within any of the five paragraphs as follows:

> The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature, that if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implied injury to the person or property of another; or
>
> (e) the court regards it as immoral, or oppose to the public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

**[47]** In a Supreme Court case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 the court quoted the case of *Phoenix Insurance v. Adas* [1987] 2 All ER 152 where Kerr LJ stated as follow:

> It is perfectly settled, that where the contract which the plaintiff seeks to enforce ... is express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such penalty implies a prohibition ... And it may be safely laid down, notwithstanding some *dicta* apparently to the contrary, that if the contract be rendered illegal it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?

**[48]** In the same case at p. 63, Hashim Yeop Sani CJ (as he than was) quoted Lindley LJ in *Scott v. Brown, Doering, McNab & Co* [1892] 2 QB 724 which stated this:

> *Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense and express a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. if the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for their proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson.* (Cowp. 343).

**[49]** Reverting back to the said supplemental agreement (P13), the object of cls. 2 and 4 of P13 clearly contravenes provisions of s. 105 of the Banking and Financial Institutions Act 1989 for providing false information which caused a false entry in any document relating to the transaction of a licensed institution and in this case the HSBC.

**[50]** Therefore, cls. 2 and 4 of P13 is forbidden by law and contrary to public policy and if permitted, it would defeat the law and as such contravened s. 24 of the Contracts Act 1950.

**[51]** In the circumstances, this court finds and hold the supplemental agreement dated 1 August 2007 is void and unenforceable.

**[52]** The issue of illegality of P13 is question of law and need not be pleaded by the defendants. This is also explained by the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang (supra).*

**[53]** Having declared P13 is void and unenforceable, the next issue is whether the plaintiff can seek the statutory relief provided in s. 66 of the Contracts Act 1950.

Section 66 provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

**[54]** It is trite law that the prerequisite to obtaining relief under s. 66 is that the party seeking relief must not be a party to the illegality. The court will not assist a party that involves in any illegal act. Therefore the party seeking relief under s. 66 must show that he has no knowledge of the illegality at the time the contract was entered and the illegality was only discovered subsequently.

**[55]** In a Federal Court case of *Ng Siew San v. Menaka* [1973] 1 LNS 99; [1973] 2 MLJ 154 the court quoted the case of *Kanuri Sivaramakrishnaiah v. Vemuri Venkata Narahari Rao* AIR 1960 Andh Pra 186 at p. 188 where Chandra Reddy CJ said this:

> It is manifest that in order to invoke this section, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage by parties who knew from the beginning the illegality thereof ...

**[56]** In the present case, having perused the evidence before the court especially the testimony, it is clear that the plaintiff has the knowledge of this illegal act and the purpose of doing it is to ensure that HSBC will release the said loan to the plaintiff.

**[57]** Therefore, this court finds that the plaintiff is unable to obtain the relief under s. 66 of the Contracts Act 1950.

**[58]** As the supplemental agreement P13 is unenforceable and plaintiff failed to seek the relief under s. 66 of the Contracts Act 1950, thus, the claim for the amount of RM267,000 is not substantiated.

**[59]** The plaintiff cannot rely on the sale and purchase agreement dated 19 March 2007 to prove its claim for the said sums of RM267,000 as PW1 on his own admission confirmed that there was no differential sum owed by the defendants under the said sale and purchase agreement.

**[60]** This is reflected at question and answer 25 of PW1's written statement (WSP1A) as follows:

> Q: Why did you issue the letter dated 4.7.2007 confirming that the differential sum has been paid?
>
> A: I issued the confirmation, that the differential sum has been paid as there was no differential sum owing under the Sale and Purchase Agreement anymore by virtue of our arrangement with the Defendants.

**[61]** Based on the abovementioned reasons, on the balance of probabilities, this court finds that the plaintiff failed to prove its claim for the said amount of RM267,000. Consequently plaintiff's claim for interest on the said sum of RM267,000 at the rate of 8% per annum until full settlement does not arise and also rejected.

**Plaintiff's Claim For Monthly Rentals From December 2006 To August 2007 In The Sum Of RM135,000**

**[62]** The tenancy period pursuant to the tenancy agreement dated 3 August 2005 between the plaintiff and the defendants expired on 31 October 2006. However cl. 8 of the said agreement provides for the extension of the said tenancy for a rental of RM15,000 per month.

**[63]** In this case, upon the expiry of the tenancy period on 31 October 2006, the defendants continue to occupy the said property. The defendants contend that since they have entered into the sale and purchase agreement dated 19 March 2007 to purchase the said property, the defendants do not have to pay the said rentals.

**[64]** The first defendant also in his examination-in-chief testified that he did not owe any outstanding rental to the plaintiff as he has paid six months rental in advance to the plaintiff pursuant to cl. 8 of the said tenancy agreement.

**[65]** The first defendant also said that the six months rental that he had paid in advance is for the rental for the period from September 2006 until February 2007, thereafter first defendant was not required to pay further rental from March 2007 until August 2007 as the parties had entered into the sale and purchase agreement for the defendants to buy the said property.

**[66]** In law, the court may ascertain whether a contract existed based on the facts and conduct of parties even in the absence of a formal contract.

**[67]** In *Kwek Seow Kee & Anor v. KT Packaging Sdn Bhd (No. 1)* [1998] 2 CLJ Supp 472, Abdul Malik J stated:

> I am constrained to say that a contract may be found, as a fact, to be in existence despite the fact that it cannot be analysed precisely into an offer and corresponding acceptance provided that terms have been fully agreed and executed by parties.

**[68]** In the present case, based on the facts mentioned and the evidence of first defendant, this court is of the considered view that there exists an agreement by parties to continue with the tenancy agreement upon its expiration on 31 October 2006.

**[69]** Next, s. 9.0 of the said sale and purchase agreement dated 19 March 2007 clearly provides that the vacant possession of the said property is to be delivered to the defendants upon the defendants paid the full purchase price. The evidence also shows that the sum of RM1,960,000 was paid to the plaintiff only on 21 August 2007.

**[70]** As such the plaintiff is the owner of the said property until 21 August 2007 and therefore the defendants are required to pay the said rentals. There is also no evidence to show that the defendants have paid the six months rentals in advance as claimed.

**[71]** In the circumstances, the plaintiff has succeeded in proving its claim against the defendants for the sum of RM135,000 for rental from December 2006 to August 2007.

**The Renovation Costs Of RM31,190 And Cost Of Cabinet And Rack In The Sum Of RM5,100**

**[72]** The claim for renovation works and costs of cabinet and racks are supported by invoices P4, P7, P8 and P11. Based on the dates of these invoices, the works were carried out when the defendants occupy the said property. The first defendant's name is also stated in all the invoices mentioned. Furthermore the contractors that carried out the renovation works, PW4 and PW5 testified that they carried out the renovation works in the presence of the defendants.

**[73]** In the circumstances, this court finds that the plaintiff has proved its claim for the renovation works in the sum of RM31,190 and the costs of cabinet and rack in the sum of RM5,100.

**[74]** As to the liability of the second defendant, the evidence shows that second defendant negotiated with PW1 and PW2 on the renovation to be carried out in the said property. Her initials 'RMV' were used to show who was to pay for the renovation. The second defendant also was involved in the negotiation with the plaintiff on the tenancy of the said property. The cheques for rental and renovation works were also signed by the second defendant. The second defendant is also a party to the sale and purchase agreement dated 17 March 2007.

**[75]** Based on the above facts, both the defendants are equally liable for plaintiff's claim.

**Conclusion**

**[76]** Based on the above mentioned reasons, the plaintiff's claim for the sums of RM267,000 arising from the supplemental agreement dated 1 August 2007 is rejected.

**[77]** The plaintiff's claim for rental from December 2006 to August 2007 in the sum of RM135,000 is allowed.

**[78]** The plaintiff's claim for renovation cost of RM31,190 is allowed.

**[79]** The plaintiff's claim for cost of cabinet and rack in the sum of RM5,100 is also allowed.

**[80]** The court further orders the defendants pay the plaintiff interest of 5% per annum for the whole judgment sum from the judgment date until full realisation.

**[81]** I also order costs of RM30,000 to be paid by the defendants to the plaintiff.